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**M. Timmerman, ‘Balancing effective criminal sanctions with effective fundamental rights protection in cases of VAT fraud: *Taricco*’, *Common Market Law Review* (2016) 53, 3, pp. 779-796.**

## **1. Introduction**

(p. 779) The *Taricco* case is about VAT fraud. Since VAT revenue forms part of the EU’s own resources, VAT fraud is a matter of Union law.<sup>1</sup> As a consequence, the duty to provide effective sanctions for violations of EU law applies to cases of VAT fraud. Because the duty under EU law to provide effective sanctions is usually based on Article 4(3) TEU, the primacy of Union law clearly precludes the application of national rules that would render sanctions ineffective.

Matters are more complicated, however, when the disapplication of the national rules would violate a fundamental right that is protected by national constitutional law.<sup>2</sup> In that case, underlining the precedence of the duty to provide effective sanctions exposes the inherent tension between effective sanctions and fundamental rights.<sup>3</sup> It moreover reveals that a tension exists between EU law’s principles of effectiveness and primacy on the one hand, and fundamental rights as protected by national constitutions on the other.<sup>4</sup> This tension is clearly visible when EU law requires the imposition of criminal penalties, because these sanctions, by definition, have a serious impact from the perspective of the individual. In the field of criminal law it is therefore widely acknowledged that fundamental rights provide legitimate grounds for limiting the effectiveness of sanctions.

1. Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, EU:C:2013:105, paras. 25–28.

2. Cases of “ordinary primacy” could be distinguished from cases where EU law needs to be given precedence over national *constitutional* law, see Claes, “The Primacy of EU Law in European and National Law” in Arnulf and Chalmers (Eds.), *The Oxford Handbook of European Union Law* (OUP, 2015), pp. 187–199.

3. Cf. e.g. Gulliksson, “Effective Sanctions as the One-Dimensional Limit to the *Ne Bis in Idem* Principle in EU law” in Nergelius and Kristofferson (Eds.), *Human Rights in Contemporary European Law* (Hart, 2015), pp. 157–158.

4. The most obvious recent example of this tension is Case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, EU:C:2013:107.

(p. 780) That fundamental rights are allowed to limit the effectiveness of criminal penalties does not yet say anything about the particular limits they provide. These limits depend on the level of protection that is afforded to the applicable fundamental rights. The *Taricco* judgment shows that the ECJ is not always willing to provide a high level of fundamental rights protection. Instead, the Court here prioritized the primacy and effectiveness of EU law. In the interest of the effective penalization of serious VAT fraud, the Court, in fact, merely provided the ECHR's minimum level of protection to the legality principle enshrined in Article 49(1) of the Charter. Since a higher level of protection would hamper the effectiveness of criminal penalties for VAT fraud, the Court, in effect, required Italy to make the protection of the, constitutionally enshrined, Italian legality principle conform to this minimum standard. In this regard, *Taricco* gives rise to comparable, yet more difficult, questions about the level of fundamental rights protection to those in the related landmark cases Case C-399/11, *Melloni* and Case C-617/10, *Åkerberg Fransson*.

This case note discusses the duty to provide effective criminal sanctions for serious cases of VAT fraud, the Court's interpretation of the legality principle, and the relationship between EU fundamental rights and more protective national standards.

## 2. Factual and legal background

Ivo Taricco and others were accused of having committed VAT fraud worth several million euros, through trade in champagne. The accused had allegedly set up an organization wherein different companies and shell companies conducted non-existent transactions, resulting in fraudulent VAT returns. Taricco and others were, therefore, alleged to have taken part in a form of fraud known as a "VAT carousel".<sup>5</sup> According to Italian law, VAT fraud constitutes a criminal offence and after preliminary investigations the case had arrived at the stage of the preliminary hearing before the *Tribunale di Cuneo* (i.e. the referring court). The Italian court needed to decide whether the accused were to be committed to criminal trial.

Although VAT fraud is clearly punishable under Italian law, the *Tribunale di Cuneo* was not convinced of its ability to commit the accused to a criminal trial due to the Italian rules on statutory limitation. The applicable Italian rules had relatively short absolute limitation periods and only allowed for a very

5. For a description of this phenomenon, see Report from the Commission to the Council and European Parliament on the use of administrative cooperation arrangements in the fight against VAT fraud, COM(2004)260, pp. 5–6.

(p. 781) narrow extension of the limitation period after criminal prosecutions had been initiated. Even after the initiation of a criminal investigation or prosecution, the absolute period of limitation could generally be extended by only one quarter of the original period (or, under the old rules, prior to 2005, by one half).<sup>6</sup> Since the crimes of tax fraud involved very complex preliminary investigations, a final verdict by the trial court was not to be expected before the expiration of even the extended period of statutory limitation. According to the *Tribunale di Cuneo*, the Italian rules provided so little room for prosecution that they lead to *de facto* impunity for crimes involving complex investigations like tax fraud and other economic offences.

In its preliminary reference, the Italian court essentially asked whether the applicable rules on statutory limitation, and the ensuing *de facto* impunity for tax fraud, were in accordance with EU law. The reference for a preliminary ruling indicated four grounds for a potential violation of EU law. The *Tribunale di Cuneo* first wanted to know whether the rules on statutory limitation amounted to either unfair competition for Italian economic operators as prohibited by Article 101 TFEU or constituted prohibited State aid under Article 107 TFEU (questions 1 and 2). In addition, the Italian court asked whether the limitation rules violated Directive 2006/112<sup>7</sup> (question 3) or the principle of sound public finances enshrined in Article 119 TFEU (question 4).

### 3. Opinion of Advocate General Kokott

Advocate General Kokott found the referring court's questions raised an additional issue, concerning the conformity of the Italian limitation rules with the EU law duty to provide for effective penalties for infringements of EU law.<sup>8</sup> In order to give the referring court a useful response to its questions, a large part of the Opinion is dedicated to the examination of the additional question.<sup>9</sup> An equally large part examined the related issue of the possible

6. Prior to the revision of the rules on limitation introduced by Law No 251/2005, the limitation period could be extended by no more than half in the event of an interruption of that period. Opinion, para 31. See further Jarvers, "Verjährung in Italien" in Sieber and Cornils (Eds.), *Nationales Strafrecht in rechtsvergleichender Darstellung. Allgemeiner Teil. Band 5: Gründe für den Ausschluss der Strafbarkeit, Aufhebung der Strafbarkeit, Verjährung* (Duncker & Humblot, 2010), pp. 602–605.

7. Council Directive 2006/112/EC of 28 Nov. 2006 on the common system of value added tax, O.J. 2006, L 347/1.

8. Opinion, paras. 73–78.

9. Ibid., paras. 79–105.

(p. 782) effects that a finding of incompatibility would entail for the criminal case in the main proceedings.<sup>10</sup>

The Advocate General distinguished between a general duty to provide for effective sanctions and a specific duty to provide criminal sanctions for EU fraud.<sup>11</sup> The general duty to provide effective sanctions for violations of EU law is based on the duty of sincere cooperation enshrined in Article 4(3) TEU and obliges Member States to sanction EU infringements in a manner that is equivalent to comparable violations of national law, and is, in any event, effective, proportionate and dissuasive.<sup>12</sup> Subject to these conditions, Member States are in principle free to choose the type of penalties (i.e. administrative or criminal) and these penalties can, in principle, be subjected to limitation periods.<sup>13</sup> However, if the limitation rules have the *general* effect of precluding the sanctioning of individuals who commit VAT fraud, then VAT fraud would only be subject to penalties *in theory*, and the limitation rules would be contrary to the general duty for Member States to impose effective penalties for infringements of EU law.<sup>14</sup>

Advocate General Kokott identified a specific duty to provide effective criminal sanctions for EU fraud in Article 2(1) of the PIF Convention.<sup>15</sup> Although the Council clearly wished to exclude VAT fraud from the scope of the PIF Convention, as appears from an Explanatory Report to the Convention,<sup>16</sup> the Advocate General dismissed that interpretation as non-binding.<sup>17</sup> Instead, she concluded that VAT fraud falls within the scope of the PIF definition on the basis of the wording and the objectives of the Convention.<sup>18</sup> The PIF Convention leads to the same conclusion as that based on the general duty to provide effective sanctions: if the Italian limitation rules would only allow for the imposition of adequate criminal penalties in rare cases, those rules would also be contrary to the specific duty to provide effective criminal sanctions inherent in Article 2 of the Convention.<sup>19</sup>

The actual assessment of the effectiveness of the Italian penalties in light of the limitation rules is left to the referring court for obvious reasons.<sup>20</sup> The

10. Ibid., paras. 106–127.

11. Ibid., para 79. Cf. Opinion, paras. 80–91 and 92–105.

12. Ibid., para 80.

13. Ibid., paras. 84 and 87–88.

14. Ibid., para 91.

15. Convention drawn up on the basis of Art. K.3 TEU, on the protection of the European Communities' financial interests, signed in Luxembourg on 26 July 1995, O.J. 1995, C 316/49.

16. Explanatory Report on the Convention on the protection of the European Communities' financial interests, text approved by the Council on 26 May 1997, O.J. 1997, C 191/4.

17. Opinion, paras. 94–99.

18. Ibid., paras. 100–103.

19. Ibid., para 105.

20. Cf. *ibid.*, paras. 86, 91 and 104–106.

(p. 783) Advocate General did, however, add extensive considerations on the potential impact that a finding of incompatibility with EU law would have on the dispute in the main proceedings.<sup>21</sup> If the rules on statutory limitation were incompatible with the duty to provide effective sanctions for infringements of EU law, the referring court would either have to interpret those rules in accordance with EU law, or, if this proved impossible, it would be obliged to refrain from applying those rules.<sup>22</sup>

The Advocate General then examined whether the duty for the national court to give full effect to EU law could conflict with fundamental rights and, more specifically, with the legality principle of crimes and penalties (*nullum crimen, nulla poena sine lege*) as enshrined in Article 49 of the Charter.<sup>23</sup> In her view, the EU legality principle does not provide protection against the extension of applicable periods of statutory limitation, because the legality principle only provides standards for rules that define criminal responsibility and prescribe criminal penalties. The rules on statutory limitation do not define crimes or penalties, but merely determine the legal possibilities for the prosecution of a crime.<sup>24</sup> It is in this crucial regard that the present case should be contrasted with the famous judgment in *Berlusconi*,<sup>25</sup> of which it is “vaguely reminiscent”.<sup>26</sup> Unlike *substantive* rules that define a crime and prescribe a penalty, *procedural* rules on statutory limitation are outside the scope of the EU legality principle.<sup>27</sup> Therefore, a statutory limitation period is certainly extendable as long as the original limitation period has not expired at the time of extension.<sup>28</sup>

Since the EU legality principle does not preclude the extension of a limitation period that has not yet expired, the national court is obliged to apply the rules on statutory limitations in a manner consistent with the duty to provide effective penalties for violations of EU law; in the Advocate General’s view, this could give rise to a duty for the national court to apply an “adequate limitation regime” instead of the applicable rules on limitation.<sup>29</sup> Advocate General Kokott provides the national court with guidance on how to apply such an “adequate limitation regime”. She suggests three alternative

21. Ibid, paras. 106–127.

22. Ibid., paras. 107–112.

23. Ibid., paras. 113–120.

24. Ibid., para 115–116.

25. Joined cases C-387/02, C-391/02 & C-403/02, *Criminal Proceedings against Silvio Berlusconi and Others*, EU:C:2005:270.

26. Opinion, para 4.

27. Ibid., paras. 115–119.

28. Ibid., para 120.

29. Ibid., paras. 121–124.

(p. 784) approaches.<sup>30</sup> The national court could, for example, apply the provisions on limitation of VAT fraud simply *without* the applicable absolute limitation period (suggestion 1), it could retroactively apply newly adopted rules, (from 2011),<sup>31</sup> which have a longer limitation period (suggestion 2), or, alternatively, it could also apply the old rules on limitation, which existed prior to the 2005 revision (suggestion 3).

Although the Advocate General focused on the additional question about the duty to provide effective sanctions and its implications for national criminal law, she examined the referring court's explicit questions as well.<sup>32</sup> She concluded that the inadequate enforcement of VAT penalties did not necessarily promote collusive conduct between undertakings and was thus not contrary to Article 101 TFEU (question 1).<sup>33</sup> The inadequate enforcement of VAT rules could not amount to prohibited State aid either, because the Italian rules applied equally to all undertakings subject to Italian criminal law and were, therefore, non-selective (question 2).<sup>34</sup> Moreover, the Italian limitation regime did not infringe Directive 2006/112 (hereafter: "the VAT Directive")<sup>35</sup> – the fact that penalties for tax fraud were hard to impose did not in itself amount to a tax exemption, as it did not mean the right to levy tax no longer existed (question 3).<sup>36</sup> Finally, the Italian rules did not infringe Article 119 TFEU, since the "soundness" of a Member State's public finances is determined by an evaluation of the entirety of the national budget and not by exclusively looking at a specific part thereof, such as the failure to enforce the right to levy tax.<sup>37</sup>

#### 4. Judgment of the Court

Like Advocate General Kokott, the Court's Grand Chamber focused on the compatibility of the Italian limitation rules with the duty to provide effective sanctions for VAT fraud and its effect on the main proceedings.<sup>38</sup> Unlike the Advocate General, however, the Court did so by reformulating the referring court's third question and taking it as the first element of its examination.<sup>39</sup>

30. Ibid., paras. 125–126.

31. "... limitation periods applicable to tax offences, which have been extended by a third, as now provided for in Law No 148/2011", *ibid.* para 126.

32. Ibid., paras. 57–73.

33. Ibid., para 60.

34. Ibid., para 61.

35. Cited *supra* note 7.

36. Ibid., para 66.

37. Ibid., paras. 70–71.

38. Judgment, paras. 34–58.

39. Ibid., paras. 34–35.

(p. 785) Citing *Åkerberg Fransson*,<sup>40</sup> the Court indicated two sources that enshrine a general duty to provide effective penalties for VAT fraud. First, the VAT Directive when read in conjunction with the duty of sincere cooperation enshrined in Article 4(3) TEU, and, second, Article 325 TFEU.<sup>41</sup> Although these sources generally leave the Member States the freedom to choose between administrative penalties, criminal penalties, or a combination of the two, the Grand Chamber stressed that certain *serious* cases of VAT evasion could nevertheless necessitate the imposition of criminal penalties.<sup>42</sup>

In addition to a general duty to provide effective sanctions for VAT fraud, the ECJ found Article 2(1) of the PIF Convention to enshrine a duty to provide specifically for *criminal* penalties.<sup>43</sup> The Grand Chamber confirmed the Advocate General's interpretation that the broad wording of the Convention's definition of fraud, together with its objective of vigorously combatting EU fraud, justified the conclusion that VAT fraud fell within the scope of the Convention.<sup>44</sup> As a result, the Court identified three separate sources that contain a duty to provide criminal penalties for serious cases of VAT fraud: the VAT Directive in conjunction with Article 4(3) TEU, Article 325 TFEU and Article 2(1) of the PIF Convention.<sup>45</sup>

The Court qualified the VAT evasion by Taricco and others as a case of serious fraud. The ECJ did not, however, establish explicit criteria that could be relevant in concluding that a specific form of fraud deserved the label "serious". The only reason for the conclusion that the main proceedings involved serious fraud was the determination that the alleged fraud amounted to several million euros. The ECJ then underlined that, for serious cases of fraud, only criminal penalties would result in effective and dissuasive penalization.<sup>46</sup> Since Italian law provides criminal penalties for VAT fraud with a maximum prison sentence of seven years, the Court found no reason to doubt the dissuasiveness of the penalties in themselves.<sup>47</sup> In the ECJ's view, the fact that a limitation period is provided for by Italian law does not

40. Case C-617/10, *Åkerberg Fransson*.

41. Judgment, paras. 36, 37 and 39.

42. *Ibid.*, para 39.

43. *Ibid.*, paras. 40–43. Unlike most literature and the Opinion of the A.G., the Court referred to the Convention drawn up on the basis of Art. K.3 TEU, on the protection of the European Communities' financial interests, signed in Luxembourg on 26 July 1995, O.J. 1995, C 316/49, as the "PIF Convention". I will nevertheless continue to refer to this Convention as the "PIF Convention".

44. *Ibid.*, para 41.

45. *Ibid.*, para 47.

46. *Ibid.*, paras. 42–43.

47. *Ibid.*, para 45.



(p. 786) generally deprive the applicable penalties of their effectiveness and dissuasiveness either.<sup>48</sup>

The general effectiveness and dissuasiveness of the Italian system of criminal penalties for VAT fraud could nevertheless be seriously hampered by specific circumstances. Such circumstances occur if Italian limitation rules result in impunity for perpetrators of serious fraud in a considerable number of cases because these offences are usually time-barred before a final conviction can be imposed.<sup>49</sup> The Court underlined that, in those circumstances, the Italian criminal penalties would not satisfy the requirements of effectiveness and dissuasiveness inherent in the EU legal obligation to sanction. The Italian rules would also violate EU obligations if the prosecution of fraud cases affecting national financial interests was not as severely impeded by limitation rules as those at issue.<sup>50</sup>

In line with the Advocate General's Opinion, the ECJ subsequently considered the impact that a finding of incompatibility of the Italian limitation regime would have on the dispute in the main proceedings.<sup>51</sup> The Court referred to Article 325 TFEU to stress that, *inter alia*, primary Union law imposes a precise obligation to provide for effective and dissuasive penalties for EU fraud.<sup>52</sup> By virtue of the principle of precedence of EU law, Italian rules depriving the criminal penalties for VAT fraud of their effectiveness are automatically rendered inapplicable by that provision.<sup>53</sup> This could result in an obligation for the national court to disapply the Italian limitation rules to give full effect to EU law.<sup>54</sup> If that were the case, the national court would also be obliged to ensure that fundamental rights are respected, and more specifically, the legality principle.<sup>55</sup>

The Court found that the disapplication of the Italian limitation rules would not violate the legality principle however. Although a disapplication of the Italian limitation rules would allow for the imposition of a criminal penalty in circumstances that were not permissible under national law, the crime and the penalty itself would remain in accordance with the applicable Italian criminal law. The disapplication of the limitation rules would merely allow for the effective prosecution of the crimes and imposition of penalties which were, at

48. Ibid., para 45. Cf. Opinion of A.G. Kokott in Joined cases C-387/02, C-391/02 & C-403/02, *Criminal Proceedings against Silvio Berlusconi and Others*, EU:C:2004:624, paras. 107–108.

49. Ibid., para 47.

50. Ibid., paras. 43 and 48.

51. Ibid., paras. 49–58.

52. Ibid., paras. 50–51.

53. Ibid., para 52.

54. Ibid., paras. 49 and 52–53.

55. Ibid., paras. 53–54.

(p. 787) the time the acts were committed, undisputedly established by Italian criminal law.<sup>56</sup> Therefore, the Charter's legality principle would not be infringed by a disapplication of the Italian rules on limitation. In addition, and apparently as a secondary argument, the Grand Chamber referred to the case law of the European Court of Human Rights to underline that the legality principle under the ECHR allows the extension of existing limitation periods.<sup>57</sup>

The Grand Chamber therefore answered the third question by stating that the national court would be obliged to disapply the Italian limitation rules if these rules deprive the criminal penalties for VAT fraud of their effectiveness and dissuasiveness. With regard to the first, second and fourth questions, the ECJ's concise response is essentially based on the answers proposed by the Advocate General.<sup>58</sup>

## 5. Comment

### 5.1. *The duty to provide effective sanctions: obligations to criminalize VAT fraud*

Ever since the famous *Greek maize* judgment, Member States have been unequivocally obliged to impose sanctions for infringements of EU law.<sup>59</sup> In order to ensure the effectiveness of Union law, violations of EU law are to be sanctioned in the same way as similar breaches of national law.<sup>60</sup> In addition to this so-called "assimilation principle",<sup>61</sup> *Greek maize* required the Member States to ensure that, in any event, domestic penalties were also effective, proportionate and dissuasive.<sup>62</sup> Thus, *Greek maize* provides two

56. Ibid., para 55–56.

57. Ibid., para 57.

58. Ibid., paras. 59–65.

59. Case C-68/88, *Commission v. Hellenic Republic (Greek maize)*, EU:C:1989:339, para 23.

60. Ibid., para 24.

61. See, e.g., Mitsilegas, *EU Criminal Law* (Hart, 2009), p. 63, Satzger, *International and European Criminal Law* (Beck, 2012), p. 71, Miettinen, *Criminal Law and Policy in the European Union* (Routledge, 2013), p. 13. The same principle is also referred to as "the principle of equivalence", see Dougan, "From the Velvet Glove to the Iron Fist: Criminal Sanctions for the Enforcement of Union Law", in Cremona (Ed.), *Compliance and the Enforcement of EU Law* (OUP, 2012), pp. 79–80 or "the equality of sanctions principle", see Peers, *EU Justice and Home Affairs Law*, 3rd ed. (OUP, 2011), p. 770.

62. Case C-68/88, *Greek maize*, para 24. The reference to the need for sanctions to be proportionate is not focused on in *Taricco*, see judgment, para 43. This is probably a result of the referring court's focus on the effectiveness of penalties, see judgment, para 26.

(p. 788) distinguishable obligations for Member States to provide certain types and levels of sanctions.<sup>63</sup>

The *Taricco* judgment confirmed that the two *Greek maize* criteria provide grounds to dismiss certain types of national sanctions for infringements of EU law as inadequate.<sup>64</sup> In addition, *Taricco* makes clear that the two *Greek maize* criteria can *independently* oblige the Member States to prescribe criminal penalties for violations of EU law. Although it was already obvious that the Member States could be obliged to provide criminal sanctions for violations of Union law on the basis of the assimilation principle,<sup>65</sup> the Court had not expressly determined that an obligation to provide criminal penalties could be based independently on the requirement that penalties are effective and dissuasive.<sup>66</sup>

*Taricco* does, however, identify the requirements of effectiveness and dissuasiveness as the reason for providing criminal penalties.<sup>67</sup> In the Court's view, VAT evasion amounting to several million euros constitutes a form of serious fraud for which only criminal penalties could be sufficiently effective and dissuasive. This means that, even when a Member State might have chosen to sanction forms of VAT fraud administratively, or by a combination of administrative and criminal penalties, EU law demands serious forms of VAT fraud to be sanctioned by criminal penalties. The ECJ thus clearly requires the criminalization of certain forms of VAT fraud.

Article 325 TFEU has codified the *Greek maize* duty to provide equivalent, effective and dissuasive penalties for the specific case of EU fraud.<sup>68</sup> Although it is generally denied that this provision adds substantively to the general *Greek maize* duty to provide sanctions for infringements of Union law,<sup>69</sup> the provision is not completely without purpose either. Since Article 325 TFEU underlines that the effective enforcement of EU fraud is especially significant, it fulfils a symbolic function. This symbolic significance is, arguably, perceivable in *Taricco*, because the Court exclusively refers to the *Greek maize* duty in the form of Article 325 TFEU in most of its considerations.<sup>70</sup> With regard to substance, however, the judgment treats the general *Greek*

63. See further Klip, *European Criminal Law. An Integrative Approach*, 2nd ed. (Intersentia, 2012), pp. 73–75 and Hecker, *Europäisches Strafrecht*, 5th ed., (Springer, 2015), pp. 248–251.

64. Judgment, paras. 37 and 43.

65. See e.g. Case C-186/98, *Criminal proceedings against Amélia Nunes and Evangelina de Matos*, EU:C:1999:376, paras. 7 and 14.

66. See Dougan, op. cit. *supra* note 61, pp. 80–82.

67. Judgment, para 39. This confirms the view formulated by A.G. Ruiz-Jarabo Colomer in his Opinion in Case C-176/03, *Commission v. Council*, EU:C:2005:311, para 43.

68. See paras. 1 and 2 of that provision and cf. judgment, para 37.

69. See Dougan, op. cit. *supra* note 61, p. 79.

70. Judgment, paras. 50–52 and 58.

(p. 789) *maize* duty, which is based on Article 4(3) TEU, and the codified *Greek maize* duty of Article 325 TFEU as co-existing duties with the same content.<sup>71</sup>

In addition to the *Greek maize* duty to provide criminal penalties for serious forms of VAT fraud, the Grand Chamber identifies a second obligation to criminalize serious cases of VAT fraud. The Court finds Article 2(1) of the PIF Convention to contain such a duty, as VAT fraud is within the scope of the definition of fraud in Article 1 of the Convention.<sup>72</sup> The conclusion that VAT fraud is within the scope of the PIF Convention is certainly significant, because the Convention provides additional room to oblige the Member States to impose criminal penalties. Article 2(1) of the Convention requires the criminalization not only of the *committing* of the forms of conduct described in Article 1(1), but also of the participation in, and the instigation and attempt of, these acts. The Convention moreover requires heads of businesses to be held criminally liable if their companies commit EU fraud.<sup>73</sup>

By concluding that VAT fraud is within the PIF definition of EU fraud, the ECJ has created an obligation to criminalize not only VAT fraud itself, but also the instigation and attempt thereof, as well as the participation therein. With that interpretation, the Grand Chamber clearly disregarded the views that the Member States expressed about the desirable scope of EU fraud. The Member States had already made it clear that they deemed VAT fraud to be beyond the scope of the PIF Convention.<sup>74</sup> This unequivocal position has been maintained ever since. In fact, the issue whether VAT fraud is to be included in the definition of EU fraud proved highly controversial in the negotiations on the PIF Directive, which is intended to replace the PIF Convention. Contrary to the Commission's proposal for the PIF Directive,<sup>75</sup> and the European Parliament's position,<sup>76</sup> the Council (i.e. the Member States) explicitly wish to exclude VAT fraud from the scope of the definition of EU fraud in the PIF Directive.<sup>77</sup>

71. Ibid., para 47.

72. Ibid., para 41.

73. See Art. 3 of the PIF Convention.

74. Cited *supra* note 15.

75. Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interest by means of criminal law, COM(2012)363, Recitals 4 and 5.

76. See Information Note from the General Secretariat of the Council to the Permanent Representatives Committee/Council on the Proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law – Outcome of the European Parliament's first reading, 29 Apr. 2014, Interinstitutional File 2012/0193, Document Number: ST 9024 2014 INIT. The documents in Interinstitutional File 2012/0193 are accessible via <[www.consilium.europa.eu/en/documents-publications/public-register/](http://www.consilium.europa.eu/en/documents-publications/public-register/)>.

77. For a description of the ongoing negotiations about the PIF Directive and the position of the Member States about the inclusion of VAT fraud in the new PIF definition, see Note from

(p. 790) The unresolved debate about the scope of the PIF definition shows that the *Taricco* case influenced the legislative process. Following *Taricco*, the Luxembourg Presidency issued an immediate response asking the Member States to reflect on its significance for the ongoing negotiations.<sup>78</sup> With this sensitive political context in mind, which is moreover influenced by the fact that the PIF definition determines the competence for the future European Public Prosecutor,<sup>79</sup> one would expect the ECJ to substantiate its interpretation of PIF fraud elaborately. Unlike the Advocate General, the Court did not employ an extensive reasoning to justify its interpretation.<sup>80</sup> Instead, it used a single paragraph to conclude that VAT fraud fell within the scope of the PIF Convention. Unsurprisingly, the Court's reasoning has not convinced all Member States. The *Taricco* judgment has not, therefore, settled the debate about the possibility of excluding VAT fraud from the scope of the PIF definition.<sup>81</sup> As a consequence, this issue remains a focal point of the ongoing negotiations that resumed under the Netherlands Presidency in February 2016.<sup>82</sup>

## 5.2. *The relationship between effective criminal penalties and the legality principle*

After its considerations about the distinct duties to provide for effective criminal penalties for VAT fraud, the ECJ provided the national court with guidelines to establish whether the Italian limitation regime violated EU law.<sup>83</sup> The Court used the *Greek maize* obligations as possible grounds for an

the Presidency to the Delegations on Proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law – *Examination of the Presidency document*, 29 Jan. 2016, Interinstitutional File 2012/0193, Document Number: ST 5690 2016 INIT, pp. 3–6.

78. See Note from the Presidency to CATS on the Proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law (PIF Directive) – Judgment in case C-105/14, *Taricco*, 17 Sept. 2015, Interinstitutional File 2012/0193, Document Number: ST 12088 2015 INIT, pp. 1–3.

79. See Art. 12 of the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013)534 and Note from the Presidency to the Permanent Representatives Committee, 24 Nov. 2015, Interinstitutional File 2012/0193, Document Number: ST 14281 2015 INIT, pp. 2–3.

80. Cf. Judgment, para 41 and Opinion, paras. 94–103.

81. See Note from the Presidency to the Delegations, cited *supra* note 77, pp. 5–6.

82. Note from the Presidency to the Delegations on Proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law – *Examination of the Presidency document*, 18 Feb. 2016, Interinstitutional File 2012/0193, Document Number: ST 6239 2016 INIT, pp. 5–6.

83. Tridimas would probably label the specificity of the Court's answer as a "guidance case". See about the distinguishable forms of preliminary rulings Tridimas, "Constitutional

(p. 791) incompatibility with Union law. The national court could be obliged to disapply the Italian limitation rules either if these rules violated the assimilation principle,<sup>84</sup> or if they violated the duty to provide effective and dissuasive sanctions.<sup>85</sup> Unlike the Advocate General, the Court did not give general suggestions to the national court on how to give full effect to EU law if it were obliged to disapply the Italian limitation rules.<sup>86</sup> The ECJ did, however, lay down additional considerations about the relationship between, essentially, the effectiveness of Union law and the legality principle.<sup>87</sup>

The duty to provide effective criminal sanctions for serious forms of VAT fraud, coupled with the duty to give full effect to EU law, increases the repressiveness of national law in the *Taricco* case. This increased repressiveness leads to a tension with fundamental rights protection in the main proceedings, because EU law's *effet utile* might require the imposition of a criminal sanction that would not be possible under the applicable Italian rules.<sup>88</sup> EU law therefore radically alters the legal possibilities to impose a criminal sanction to the detriment of the accused.<sup>89</sup> That references to Union law can seriously harm the legal position of the individual in a national criminal case is certainly not without precedent.<sup>90</sup> It is nevertheless important to recognize that, within the criminal sphere, negative effects on the position of an individual have a high impact. The impact on the legal position of the accused is even more dramatic where EU law requires the alteration or disapplication of the applicable national rules in a way that might violate a national constitutional standard. The Court's judgment shows that it is nevertheless willing to accept such a far-reaching negative impact on the legal position of the accused.

That the Court might require the national court to alter the legal position of the accused in violation of a national constitutional standard is the result of a diverging interpretation of the legality principle in EU law and in Italian law.

review of Member State action: The virtues and vices of an incomplete jurisdiction", (2011) *International Journal of Constitutional Law*, 739–745.

84. Judgment, para 48.

85. Ibid., para 47.

86. Cf. Opinion, paras. 121–127.

87. Judgment, paras. 53–57.

88. The ECtHR acknowledged this effect of extending limitation periods, by deeming an extension of an applicable limitation period to have a detrimental effect on the situation of the accused, in particular by frustrating their expectations, see ECtHR, *Coëme and Others v. Belgium*, Appl. Nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, judgment of 22 June 2000, para 149.

89. Cf. Spaventa, "Opening Pandora's Box: Some reflections on the constitutional effects of the Decision in *Pupino*", 3 *EuConst* (2007), 13–14.

90. See e.g. Lenaerts and Corthaut, "Of birds and hedges: The role of primacy in invoking norms of EU law", 31 *EL Rev.* (2006), pp. 296–297.

(p. 792) The ECJ concluded that the EU legality principle does not provide protection against the extension of applicable limitation terms to the detriment of the accused. Underlying this conclusion is a distinction between rules that define crimes and penalties (i.e. rules of *substantive* criminal law) and *procedural* rules. Limiting the protection of the legality principle to rules of substantive criminal law is in line with the Court's previous case law<sup>91</sup> and with the ECtHR's case law on Article 7 ECHR.<sup>92</sup> The ECJ's interpretation of the legality principle's scope is therefore certainly reasonable.

The conformity of the ECJ's interpretation of the legality principle with that of the Strasbourg Court, is, moreover, in accordance with the ECJ's previous case law. In the existing case law on the EU legality principle, the Court has explicitly reiterated parts of the ECtHR's general considerations on the ECHR legality principle.<sup>93</sup> That the ECJ generally<sup>94</sup> follows the ECtHR's interpretation of the legality principle shows that it is only willing to provide the minimum standard of protection.<sup>95</sup> Although reasonable, the Court's decision to provide merely the minimum standard of protection, reflects a clear choice in light of Article 52(3) of the Charter. This choice entails the possibility that the ECJ's interpretation of the legality principle conflicts with national interpretations of that fundamental right even though these may be equally reasonable.<sup>96</sup>

### 5.3. *The potential for constitutional conflict after Taricco*

An actual conflict between diverging interpretations of the legality principle could indeed be a direct consequence of *Taricco*. Such a conflict is likely to arise because Italian law includes rules on limitation periods in the protection

91. See Case C-105/03, *Criminal proceedings against Maria Pupino*, EU:C:2005:386, para 46 and cf. A.G. Kokott's Opinion in that case, EU:C:2004:712, paras. 41–42. The distinction between substantive and procedural rules in the *Pupino* judgment has been criticized by commentators, see e.g. Mitsilegas, op. cit. *supra* note 61, pp. 30–31.

92. Judgment, para 57 and the ECtHR case law referred to there.

93. Cf., ECtHR, *Rohlena v. Czech Republic*, Appl. No. 59552/08, judgment of 27 Jan. 2015, para 50 with, e.g. Joined Cases C-189, 202, 205–208/02 P & C-213/02 P, *Danske Rørindustri and Others v. Commission*, EU:C:2005:408, paras. 216–219, Case C-303/05, *Advocaten voor de Wereld v. Leden van de Ministerraad*, EU:C:2007:261, para 50 and Case C-308/06, *Intertanko and Others v. Secretary of State for Transport*, EU:C:2008:312, para 71.

94. The notable exception is the *Berlusconi* judgment, where the ECJ provided more protection than the ECtHR by including the *lex mitior* principle in the legality principle, see Joined cases C-387, 391 & 403/02, *Criminal Proceedings against Silvio Berlusconi and Others*, para 68.

95. That ECHR rights are only intended to provide minimum standards is clearly confirmed by Art. 53 ECHR, as well as Arts. 52(3) and 53 of the EU Charter.

96. See about diverging reasonable interpretations as the source of constitutional conflict Claes, op. cit. *supra* note 2, pp. 203.

(p. 793) provided by the legality principle.<sup>97</sup> The ECJ's legality interpretation, which might even be regarded as *absolutely* excluding extensions of limitation periods from its scope,<sup>98</sup> therefore seems to fall short of the protection that is provided by the Italian legality principle.<sup>99</sup> Since the Italian *Corte di Cassazione* nevertheless declared the contested limitation rules inapplicable after the *Taricco* judgment, the Milan Court of Appeal (*la Corte d'appello di Milano*) immediately asked the Constitutional Court (*la Corte costituzionale*) to rule on the conformity of the Italian rules ratifying the EU treaties with the legality principle enshrined in the Italian Constitution.<sup>100</sup> The Constitutional Court is basically requested to give effect to its *controlimiti* doctrine, by which it, in essence, reserved the power to disapply EU law when it violates core constitutional principles.<sup>101</sup> The *Taricco* judgment could therefore lead the Italian Constitutional Court to specifically reject the absolute primacy of Union law in order to save its interpretation of the legality principle.

The potential constitutional conflict after *Taricco* bears resemblance to the conflict following *Melloni*.<sup>102</sup> As is well known, *Melloni* and the related judgment in *Åkerberg Fransson*<sup>103</sup> established that, when the Charter applies,<sup>104</sup> more protective national constitutional standards can only apply as long as they do not compromise the primacy, unity and effectiveness of EU

97. See, with further references, Scalia, "Protection of Fundamental Rights and Criminal law. The Dialogue between the EU Court of Justice and the National Courts", (2015) *eu crim*, 100, at 107 and Lassalle, "Taricco kills two birds with one stone for the sake of the PIF", <[www.europeanlawblog.eu](http://www.europeanlawblog.eu)> (last visited 16 Dec. 2015).

98. The ECJ's focus on the text of Art. 49(1) of the Charter, which requires crimes and penalties to be established by law at the time of the accused conduct, could imply an *absolute* exclusion of limitation rules from the scope of protection of the legality principle, see judgment, paras. 55–56. Although such an interpretation would potentially violate the ECtHR's interpretation of Art. 7 ECHR, the ECtHR has never ruled *explicitly* that the extension of limitation periods for offences that have become time-barred is excluded by the legality principle, see e.g. *Coëme and Others v. Belgium*, cited *supra* note 88, para 149 and ECtHR, *OAO Neftyanaya Kompaniya Yukos v. Russia*, Appl. No. 14902/04, judgment of 20 Sept. 2011, paras. 563–564, 570–571 and 575.

99. Jarvers, "Das Gesetzlichkeitsprinzip in Italien" in Sieber and Cornils (Eds.), *Nationales Strafrecht in rechtsvergleichender Darstellung. Allgemeiner Teil. Band 2: Gesetzlichkeitsprinzip, Internationaler Geltungsbereich des Strafrechts, Begriff und Systematisierung der Straftat*, (Duncker & Humblot, 2008), p. 64.

100. See Vigano, "Prescrizione e reati lesivi degli interessi finanziari dell'UE: la Corte d'appello di Milano sollecita la Corte costituzionale ad azionare i 'controlimiti'", <[www.penale.contemporaneo.it/](http://www.penale.contemporaneo.it/)> (last visited 16 Dec. 2015) and Scalia, op. cit. *supra* note 97, 107.

101. See about this doctrine Claes, op. cit. *supra* note 2, pp. 186 and 195.

102. Case C-399/11, *Melloni*.

103. Case C-617/10, *Åkerberg Fransson*.

104. See further Dougan, "Judicial review of Member State action under the general principles and the Charter: Defining the 'scope of Union law'", 52 *CML Rev.* (2015), 1201–1245.



(p. 794) law.<sup>105</sup> The Court’s reasoning in *Taricco* certainly implies that the application of the more protective Italian legality principle would indeed compromise the primacy and effectiveness of EU law.<sup>106</sup> This is because the ECJ found the application of the Italian limitation rules to be at odds with the duty to provide *effective* sanctions, which has the status of primary law,<sup>107</sup> and with the *precedence* of primary Union law that enshrines that duty.<sup>108</sup> As a consequence of *Melloni* and *Åkerberg Fransson*, the national court will thus be required to disapply the Italian limitation rules even if this would violate the Italian legality principle.

In this regard, *Taricco* is merely a logical consequence of the reasoning in the related ECJ judgments in *Melloni* and *Åkerberg Fransson*. Nevertheless, *Taricco* contains potential for further controversy, because it appears to require the disapplication of a constitutionally protected fundamental right in favor of the *minimum* protection provided by EU law.<sup>109</sup> Unlike *Taricco*, the judgments in *Melloni* and *Åkerberg Fransson* involved fundamental rights that, arguably, provided more protection than the minimum ECHR standard. *Melloni*, on the one hand, concerned a fundamental right that was explicitly harmonized by secondary Union law “in order to enhance the procedural rights of persons subject to criminal proceedings whilst improving mutual recognition”.<sup>110</sup> *Åkerberg Fransson*, on the other hand, concerned the *ne bis in idem* principle,<sup>111</sup> which has been given an expansive protection under EU law in light of its free movement enhancing potential.<sup>112</sup> One could therefore argue that, since EU law itself provided more protection than the required minimum in *Melloni* and *Åkerberg Fransson*, the possible disapplication of a more protective national standard was not that problematic in those circumstances. That argumentation is, however, clearly unavailable in *Taricco*, since the ECJ is generally only willing to provide the minimum ECHR standard of protection for the legality principle. As a consequence, *Taricco* explicitly

105. Case C-399/11, *Melloni*, para 60 and Case C-617/10, *Åkerberg Fransson*, paras. 29 and 36 and further Gulliksson, op. cit. *supra* note 3, pp. 160–163. See also Case C-206/13, *Cruciano Siragusa v. Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo*, EU:C:2014:126, para 32, and Case C-198/13, *Julian Hernández and Others*, EU:C:2014:2055, para 47.

106. Judgment, para 47

107. See Arts. 4(3) TEU and 325(1) and (2) TFEU.

108. Judgment, para 52.

109. As mentioned above, the ECJ’s case law has generally adopted the ECtHR’s standard of legality protection and it thus merely provides the minimally required protection.

110. See Case C-399/11, *Melloni*, para 52.

111. See Case C-617/10, *Åkerberg Fransson*, paras. 32–42.

112. See for the relationship between free movement rules and the *ne bis in idem* principle, Opinion of A.G. Bot in Case C-486/14, *Criminal proceedings against Piotr Kossowski*, EU:C:2015:812, paras. 38–39.

(p. 795) involves a constitutional conflict between the *minimum* fundamental rights protection provided by EU law and a more protective national constitutional standard.

Since *Taricco* implies that, by virtue of *Melloni* and *Åkerberg Fransson*, the minimum protection provided by EU law's legality principle precludes the application of the Italian constitutional standard, it would have been reasonable to expect the Court to have recognized the potential for constitutional conflict. Had the ECJ indeed proceeded that way, it should have examined the Member States' common constitutional traditions with regard to the relationship between the legality principle and limitation rules.<sup>113</sup> A reference to the common constitutional traditions could have increased the legitimacy of the Court's interpretation of EU law's legality principle.<sup>114</sup> It might have, moreover, convinced the Italian Constitutional Court to bring its interpretation of the Italian legality principle in conformity with that standard or, conversely, it might have put the Italian court in the position to explicitly justify its deviating interpretation by referring to, for example, Italian constitutional identity.<sup>115</sup> Although the ECJ missed the above-mentioned opportunities to open a judicial dialogue about a potential conflict, it may get another chance if the Italian Constitutional Court refers its case on the impending constitutional conflict for a preliminary ruling.<sup>116</sup> The ECJ could then clarify its interpretation of the legality principle and the relationship between effective criminal penalties and the standards of fundamental rights protection.

## 6. Conclusion

Since *Taricco* apparently requires Italy to lower its legality protection to the minimum standard in cases of VAT fraud, the Court could have explained its approach to the national legal order with a more elaborate reasoning. Such a reasoning might have, moreover, avoided or diminished the looming conflict with the Italian Constitutional Court. The absence of an elaborate reasoning is

113. See Art. 52(4) of the Charter and further De Witte, "Art. 53" in Hervey, Peers, Kenner and Ward (Eds.), *The EU Charter of Fundamental Rights. A Commentary* (Hart, 2014), pp. 1536–1537.

114. Cf. De Boer, "Addressing rights divergences under the Charter: *Melloni*", 50 CML Rev. (2013), at 1100–1101.

115. The Italian Constitutional Court might then invoke Art. 4(2) TEU. Such an argumentation might be acceptable to the Court, although the literature is divided on the matter, cf. e.g. Besselink, "The parameters of constitutional conflict after *Melloni*", 39 EL Rev. (2014), at 549 and Claes, op. cit. *supra* note 2, p. 204–206.

116. See also Scalia, op. cit. *supra* note 97, at 107.

**(p. 796)** therefore not only disappointing from a legal perspective, it is also, possibly, conflict enhancing. It is interesting to see whether primacy and effectiveness will continue to allow the ECJ to disregard national concerns over the lowering of fundamental rights protection.